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Italian Supreme Court, 7 August 2024, no. 22350 – Jurisdiction over nullity of surety for breach of antitrust law: where the nullity of the surety reproducing the ABI contractual scheme is raised by counterclaim in proceedings for opposition to an injunction, the jurisdiction over the claim brought lies with the Commercial Court.

The Italian Supreme Court, in its judgment No. 22350, published on 7 August 2024, ruled on the matter of jurisdiction in cases where the nullity of the surety reproducing the ABI contractual scheme has been raised, by way of counterclaim and by way of exception, for breach of antitrust regulations.

The Supreme Court preliminarily observed that «*pursuant to Law No. 287 of 1990, Article 33, paragraph 2, as amended by Decree-Law No. 1 of 2012, Article 2, paragraph 2, converted, with amendments, by Law No.* 27*of 2012, the* actions for nullity of the ABI contractual scheme*are subject to* the*provisions of the Italian* Antitrust*Law. 27 of 2012, actions for nullity and compensation for damages, as well as appeals for urgent measures in relation to the breach of the provisions of Titles I to IV of the law are brought before the court having territorial jurisdiction where the specialised section referred to in Article 1 of Legislative Decree No. 168 of 2003, as amended, is established*».

The Court then recalled that «*such jurisdiction of the specialised section for companies also attracts the dispute concerning the nullity of the surety reproducing the contractual scheme drawn up by the ABI,*

containing provisions contrasting with Law No. 287 of 1990, Article 2, paragraph 2, letter a), inasmuch as the action aimed at declaring the invalidity of the downstream contract implies the ascertainment of the nullity of the prohibited agreement».

Having said this, the Supreme Court stated that «*in this matter it is necessary to distinguish the case in which the nullity of the surety is raised as a counterclaim, from the case in which it is raised only as an exception, because the consequences in terms of jurisdiction are different*».

Infact, according to the Supreme Court, «*if a counterclaim is brought to ascertain the nullity of the surety reproducing the ABI scheme - containing provisions conflicting with the antitrust legislation whose assessment implies the jurisdiction of the specialised section of the companies of another court - the judge is required to separate the cases, referring only the latter application to the different specialised court, keeping in the monitory seat the one opposing the decree and coordinating the two judgments with the institution of suspension, where the conditions exist*».

On the other hand, the Court goes on to say that if «*the nullity of the surety has been invoked* ***as an exception****, the following principle must be adopted: 'The jurisdiction of the specialised section for companies (...)* also includes *the* dispute concerning the*nullity of the guarantee .) also includes the dispute concerning the invalidity of the surety downstream of the anti-competitive agreement* ***only if the invalidity is asserted by way of action, not also if it is raised by way of exception, since in the latter case the court is called upon to hear the clauses and the agreement only incidentally****' (Cass. No. 3248/2023; cf. Cass. No. 33014/2023)*».

In the light of the foregoing, the Supreme Court therefore declared that «***the judge of the opposition, in the event that a counterclaim is proposed that falls within the jurisdiction of the specialised section of the companies of another court, is required to separate the cases, remitting to the court of the specialised section only that relating to the latter application, without prejudice instead to the mandatory one relating to the monitorio)***».

The Supreme Court finally specified how «***in these cases the coordination of the judgments is entrusted to the institution of suspension (art. 295 c.p.c.), where of course the conditions exist***».

Italian Supreme Court, 2 August 2024, no. 21841 – inapplicability of Bank of Italy provision no. 55/2005 to specific sureties: provision no. 55/2005 adopted by the Bank of Italy – which declared that certain clauses included in the corresponding negotiation form adopted by ABI member banks were contrary to Article 2, para. 2, letter a), Law no. 287 of 10 October 1990 – is not applied to specific sureties.

The Supreme Court, in its decision No. 21841, published on 2 August 2024, ruled on the possible application of Bank of Italy Order No. 55/2005 to specific sureties.

The Supreme Court preliminarily recalled that «*provision 55/2005, whereby the Bank of Italy, in its capacity as the Authority guaranteeing competition between credit institutions, pursuant to Articles 14 and 20 of Law No. 287 of 1990, declared that it was contrary to Article 2, paragraph 2 letter a) of Law No. 287 of 10 October 1990 - according to which "the Bank of Italy is the guarantor of competition between credit institutions" - is not* applicable*to* specific sureties*. 287 - according to which 'agreements between undertakings having as their object or effect the prevention, restriction or significant distortion of competition within the national market or in a relevant part thereof' - of certain clauses included in the corresponding negotiation form adopted by the ABI members, expressly concerned the type of omnibus surety»*.

The Court then excluded the application of Bank of Italy Order No. 55/2005 to specific sureties «*and this for two orders of reasons».* .

First of all, the Court, referring to passages from the Prosecutor General's Office's indictment, observed how «*the anti-competitive effect (...) is not revealed by the symmetrical adoption of the individual abusive clauses (...) but rather by the precipitate nature of such clauses in the 'omnibus' scheme, therefore involving by its nature an indefinite series of relationships, including future ones».*

Secondly, the Supreme Court pointed out that Bank of Italy Order No. 55/2005 ***«does not concern the clauses in themselves,*** *but the fact that*', as recalled by the United Sections in Judgement No. 41994/2021, '***being included in a commonly used contractual model, they can hinder the stipulation of better contractual clauses, inducing the banks to conform to a negotiating standard that provides for a lesser contractual discipline of the guarantor's position****».*

In this sense, the Court continues, «***the expulsion of the 'offending' clauses from the negotiating model that uniformly regulates the*** **omnibus*surety is their anti-competitiveness*** *deriving from a current use legitimised by the banks' recourse to a negotiating standard that is detrimental to the lender of the guarantee.* ***The inextensibility, therefore, of the cited orientation to the type of specific surety therefore depends precisely on the fact that the unfavourable judgement pronounced by the Bank of Italy is applicable only to*** **omnibus*sureties insofar as only with regard to them has the anti-competitive nature of the sanctioned clauses been ascertained***».

Lastly, the Supreme Court emphasised how through this interpretation there is «*a* ***restrictive*** *reading of*

the scope of the Bank of Italy Measure that also finds support in the discipline of Legislative Decree No. 3 of 19 January 2017, by which Directive 104/2014/EU cd. 'private enforcement' was implemented on a domestic level pursuant to Art. 7, paragraph 2, in which, in following a general principle of privileged evidence (for the purposes of compensation) for the anti-competitive finding made by a national authority, i.e. by the Commission, it is specified, with significant interpretative repercussions precisely in function of a circumscribed application of the sanctioning effects, ***that such evidence is limited to the finding 'for the author, of the nature of the infringement and its material, personal, temporal and territorial scope, assessable together with other evidence***».

COMPANY LAW

Italian Supreme Court, 20 August 2024, no. 22951 – division of the company and joint and several liability between the company being divided and the beneficiary company: not only the company being divided but also the beneficiary company is liable for the obligations of the company being divided. This liability is joint and several, and no quantitative limit is imposed on it in relation to the assets assigned with the extraordinary transaction.

The Italian Supreme Court, in its judgment No. 22951, published on 20 August 2024, ruled on the subject of liability between the company being divided and the beneficiary with respect to the obligations of the company being divided.

First of all, the Supreme Court addressed the issue of the regulation of the debts assumed by the company being divided and included in the assets assigned to the beneficiary company, stating that: «*Article 2504-decies, second paragraph, of the Italian Civil Code (now Article 2506-quater, third paragraph, of the Italian Civil Code, in the text introduced by Article 6 of Legislative Decree No. 6 of 17 January 2003) must be interpreted as meaning that* ***the company being divided is jointly and severally liable, together with the newly incorporated company, which is the beneficiary of a part of the original assets, for the debt transferred or retained by the latter***».

The Court then went on to state that: «*those jointly and severally liable debtors, moreover, are held in different ways: on the one hand, in fact, the liability of the demerged company, assuming that the claim to be enforced has remained unsatisfied,* ***postulates only the prior constitution in default of the beneficiary company*** *(i.e. beneficium ordinis),* ***not also its prior enforcement****; on the other hand,* ***only the company to which the debt is transferred or retained is liable for the entire debt, whereas the company being divided is liable to the extent of the share of the net assets remaining at the time of the division*** *and, therefore, available to satisfy creditors, given that the abovementioned provision tends to maintain intact the guarantees of the company's creditors in the event of the division, not also to increase them*».

The Court justified this orientation as follows: «*such a legal solution (limited joint and several liability) is borrowed - in its general lines - from the codified regulation, prior to the company reform,* ***of the sale of a company*** *(Article 2560, first paragraph and second paragraph, of the Italian Civil Code) with which it is intended to reconcile the need for a limited joint and several liability with the need for a limited joint and several liability .) which is intended to reconcile the needs connected to the transfer of assets and liabilities connected to the business activity with the protection of the pre-existing creditors of the transferor, who are interested in not seeing the alteration of the general asset guarantee, as resulting at the time of the transfer, offered by their debtor (transferor of the business), according to a scheme typical of the general regulation of obligations, which exclusively refers to the consent of the creditor the right to release the original debtor, accepting the replacement with another debtor indicated by the latter*».

In conclusion, the Court affirmed the following principle of law: «***the newly incorporated company is jointly and severally obliged with the divided company also for tax obligations dating from before the demerger, without prejudice to the subsidiary liability of the divided company within the limits of the residual assets***».

BANKRUPTCY LAW

Italian Supreme Court, 8 August 2024, no. 22474 – "business continuity surplus": in case of an arrangement pursuant to Article 186-bis of the Italian Bankruptcy Law (hereinafter, "l.f."), the business continuity surplus is not freely distributable by the debtor, rather it is subject to the prohibition of alteration of legitimate causes of preemption.

The Italian Supreme Court, in its decision no. 22474, issued on 8th August 2024, ruled on the composition including business continuity pursuant to Article 186-*bis* l.f. and, specifically, on an eventual financial surplus determined by the useful continuation of the business activity.

Firstly, the Supreme Court premised that the «*quaestio iuris consists in establishing whether the surplus resulting from the continuation of the business activity is freely allocable by the debtor without distribution constraints (i.e., without respecting the order of graduation of the legitimate causes of preemption) or whether such economic value should also be subject to the order of the legitimate causes of preemption pursuant to Article 160, para. 2, L. Fall. law, in compliance with the general principle of asset liability enshrined in Article 2740 of the Civil Code*».

Answering the aforementioned question, the Court found the second of the two solutions described above to be correct in relation to the applicable legal framework.

Explaining the reasoning by which the Court reached such a conclusion, the Court itself stated that «*[a] necessary preliminary definitional approach to the premises of the problem (...) requires clarification of what is meant by "arranged surplus" [surplus concordatario, ndr.]. In fact, by that term can reasonably be understood, for the purposes of the case, not every utility resulting from the continuation of the business, (...) but only that part of it which exceeds the sum allocated to the payment of creditors, according to the composition plan*».

The Supreme Court considered the aforementioned explanation necessary since «*it is important for the College to specify, in more general terms, that the financial surplus, which was referred to in the composition plan under review and to which the parties refer in today's court debate, is nothing but the increase in the value of the company achieved through business continuity (planned through the composition plan referred to in Art. 186-bis of the Bankruptcy Law), an increase which, therefore, must be considered to peacefully fall within the paradigm of "future asset" which, according to the general principles of asset liability set forth in Art. 2740 of the Civil Code, cannot be subtracted from the satisfaction of creditors, according to the order of graduation established by the subsequent art. 2741 of the Civil Code and compliance, in the context of the arrangement (...) with the order of the legitimate causes of preemption pursuant to art. 160, co. 2, L. Fall.*».

Following the thread of such reasoning, the Supreme Court ruled as follows: «*given that (a) art. 160, para. 2, L. Fall. prohibits the alteration of the causes of preemption; and that (b) allowing the debtor to freely distribute the resources coming from the continuation of the business activity could result in the alteration of the causes of preemption; then (c) the debtor is not free to distribute the surplus coming from the continuation of the business activity, because the latter constitutes a "future asset" falling under the more general asset guarantee of the debtor and therefore in compliance with the prohibition of the alteration of the legitimate causes of preemption*».

In conclusion, the Supreme Court stated the following principle of law: «[*i]n case of a composition with business continuity pursuant to Art. 186bis of the Bankruptcy Law, any financial surplus determined by the useful continuation of the business activity is to be understood as a mere increase in the value of the company's productive factors, falling within the object of the generic credit guarantee provided for by Art. 2740 of the Civil Code; it follows that it is therefore not freely distributable by the debtor, but is subject to the prohibition of alteration of the legitimate causes of preemption*».

Italian Supreme Court, 5 August 2024, no. 21954 – decree excluding claims in bankruptcy: a decree by which the delegated judge, without the necessary decisional powers, directly excludes a claim in bankruptcy, is considered radically non-existent.

The Italian Supreme Court, in its decision no. 21954, issued on 5th August 2024, ruled, in general terms, on the hypothesis of a decree excluding bankruptcy claims issued by the delegated judge lacking decision-making powers.

Firstly, the Supreme Court premised that «*according to the case law of this Court (see Cass. No. 3810/2022; Cass. No. 9910/2021; Cass. No. 27428/2009) the so-called legal non-existence or the radical nullity of a measure having decisional content, erroneously issued by a judge lacking power or issuing an abnormal measure, unrecognizable as a procedural act of a certain type, can be (...) asserted at any time, by means of an action of negative ascertainment. Nevertheless, this does not preclude the party from timely inferring the legal non-existence by the normal means of appeal, given the interest in the express removal of an effective procedural act (in this sense Cass. no. 10784/1999; see also Cass. no. 13171/2004; Cass. no. 26040/2005)*».

In particular, the Court went on to state that «*the case law has (...) held that, in addition to the hypothesis expressly provided for in Art. 161 c.p.c, second paragraph, (lack of the signature of the judge), it is possible to configure other cases of so-called legal non-existence of the judgment or decisive and final measure comparable to it, whenever, either the judge is lacking in power, or the procedural measure issued can be qualified as abnormal, because it lacks that minimum of typifying elements or prerequisites, necessary to produce legal certainty. Such flaws […] can, however, also be asserted through the ordinary means of appeal, in the time and manner provided by the legal system*».

Accordingly, the Supreme Court pointed out that «*in the present case (...) the delegated judge, entrusted with the examination of a late application for admission to the liabilities to be considered subject to Article 101 of (...) Bankruptcy Law (...) issued a decree of inadmissibility that is non-existent because it is abnormal, as it is in clear violation of the provisions of Art.101, third paragraph, cited above, according to which the delegated judge decides by decree the admission of the claim, where it is not contested by the curator, and otherwise, in the case - like the present - in which the curator has contested the claim, "the judge shall proceed to the investigation of the case in accordance with Articles 175 et seq. of the Code of Civil Procedure." according to the text applicable ratione temporis to the procedure; in fact, the delegated judge, in the present case, should have proceeded to the investigation of the case. [...] The bankruptcy court, hearing the complaint under Article 26 of the Bankruptcy Law against the decree of inadmissibility of the claim, in turn, faced with a complaint of non-existence of the contested measure, should have ruled in application of the aforementioned principle of law, instead of issuing a ruling of inadmissibility of the appeal*».

This conclusion is in line with the principle of law stated by the Supreme Cort in its decision no. 9692/2002, and reiterated in the present case, according to which «*the decree by which the delegated judge, as the*

consequence of the curatorship's opposition, in lieu of proceeding with the investigation of the case and referring the decision to the panel, directly excludes, in whole or in part, the claim that is the subject of the application for late filing of the claim in the bankruptcy proceedings, or in any case denies the privileged rank envisaged, is a radically non-existent act, inasmuch as it is issued by a judge who lacks decisional powers, and is therefore incapable of producing legal effects; it follows that the judge before whom it is challenged by one of the means provided for in the code of procedure cannot rule on the merits nor refer the parties to the first judge, but must limit himself to declaring the non-existence of the challenged measure, restoring the parties to the situation in which they were before the pronouncement of the measure declared non-existent».

ADMINISTRATIVE LAW

TAR Campania – Naples, Sec. IV, 9 August 2024 no. 4617 – Qualification of the construction of a padel court: the paving and wall works have permanent characteristics, they are not included in the free building, as per art. 6 paragraph 1 letter e-bis and e-ter DPR 380/01.

With regard to the construction of padel courts, the Campania Regional Administrative Court ruled that «*such paving and walling works have permanent characteristics and are not included in the free building sector, as per Article 6, paragraph 1, letter e-bis and e-ter of Presidential Decree 380/01. Indeed, it has been observed, in a similar case, that "these are not 'paving and finishing works of outdoor spaces' (Article 6, paragraph 1, letter e-ter, of Presidential Decree no. 380/2001) - as stated in the appeal - since, on the contrary, the levelling and paving are functional to the construction of a sports field and, therefore, a work with its own autonomy. Similarly, it is not possible to consider such construction work as falling within the category of "non-profit recreational areas" or qualifying as the construction of "elements for the furnishing of areas pertaining to buildings" (art. 6, paragraph 1, letter e-quinquies, of Presidential Decree no. 380/2001), since the fields in question are part of a sports facility open to the public and managed as part of a proper commercial activity (T.A.R. Piemonte, sentence no. 223/23)*».

It was also stated that «*the construction of padel and padball courts, in addition to the pre-existing earth football field, by creating as many concrete bases ... capable of permanently affecting the permeability of the soil, cannot be considered as a merely conservative intervention, aimed simply at renewing or replacing pre-existing elements, but integrates an autonomous work, which permanently modifies the unbuilt territory, transforming it from the building point of view into a completely new organism" (T. A. R. Sicilia, sent. 18.5.2008).A.R. Sicilia, Catania, sentence no. 1867/24); likewise, the intervention carried out cannot be included in the category, falling within the scope of free building activity, of "non-profit play areas" or of "elements for furnishing the appurtenant areas of buildings" (art. 3, paragraph 1, lett. z, Regional Law no. 16/2016), being the fields in question part of an equipped sports facility, open to the*

public, not merely recreational, therefore, and which certainly cannot qualify as "furnishing" of pertinential areas».

Cons. Stato, Ad. Pl., 30 July 2024, n. 14 – Execution of building works and subsequent forfeiture of the building permit: in the case of the execution, before the forfeiture of the building permit, of uncompleted works, a distinction must be made according to whether the incomplete works are autonomous and functional in order to establish whether they must be demolished or may be preserved.

The Plenary Assembly, in relation to the question concerning the legal rules applicable to works partially executed under a lapsed building permit and not completed under a new building permit, set out the following principles of law:

«*a) where unfinished works are carried out before the expiry of the building permit, a distinction must be made according to whether the incomplete works are autonomous and functional or not;*

b) in the case of constructions lacking the aforesaid requisites of autonomy and functionality, the Municipality must order their demolition and pristine reduction pursuant to Article 31 of Presidential Decree no. 380 of 6 June 2001, since they have been executed in total non-conformity with the building permit;

c) if the building permit provided for the construction of a plurality of functionally autonomous constructions (e.g. cottages) that are in compliance with the building permit considering the building title in a fractioned manner, the constructed buildings - without prejudice to the need to verify whether the urbanisation works have been carried out and without prejudice to the need for them to be carried out in any event - must be deemed to be supported by a suitable title, even if the constructed buildings are not fully completed, but - insofar as they are characterised by all the constitutive and essential elements - require only minor works that do not require the issuance of a new building permit;

d) if, on the other hand, the incomplete but functionally autonomous works present non-conformities that cannot be qualified as serious, the Administration may adopt the sanction laid down in Article 34 of Presidential Decree No. 380 of 2001;

e) this is without prejudice to the possibility for the interested party, where all the prerequisites exist, to obtain a permit allowing the preservation of the existing structure and to request a conformity assessment pursuant to Article 36 of Presidential Decree no. 380 of 2001 in the case of "minor" works (in terms of height, volumes, volume) with respect to those permitted, so as to provide the structure - in itself functional and usable - with a suitable permit, as to its urbanistic regularity».

Cons. St., Sec. IV, 5 August 2024 no. 6965 – Contract of Availment in public tenders: for the contract of availment to be valid, it is sufficient that the functions to be performed by the auxiliary undertaking be identified

The Council of State, has clarified that «*for the purposes of the validity of the contract of reliance it is sufficient that it is possible to identify the functions that the auxiliary company will perform, as confirmed, still very recently, by Cons. Stato, Sec. V, 3 January 2024, no. 119, according to which: "The investigation as to the essential elements of the so-called 'operational' avalimento must be carried out on the basis of the general rules on contractual hermeneutics and, in particular, in accordance with the canons set forth by the Civil Code of overall interpretation and in accordance with good faith of the contractual clauses (Articles 1363 and 1367 of the Civil Code).); the outsourcing contract therefore need not go as far as the strict quantification of the means of work, the exact indication of the qualifications of the personnel made available or the numerical indication of the same personnel; however, the contractual framework must at least allow for the identification of the exact functions that the auxiliary company will perform, directly or in aid of the auxiliary company, and the parameters to which the resources made available are to be related*».

Moreover, according to the appellate court, «*the ample space provided by the tender specifications for the operation of the preliminary investigation aid is relevant precisely with specific reference to the institution of the 'avvalimento', as can be inferred from Article 9 of the same specifications, which provides as follows: "Except in cases of false declarations, where there are compulsory grounds for exclusion of the auxiliary or where it does not meet the relevant selection criteria, the contracting authority shall, pursuant to Article 89, paragraph 3 of the Code, require the tenderer to replace the auxiliary. At any stage of the tender procedure when it is necessary to replace the auxiliary, the commission shall notify the RUP of the need, which shall request in writing, according to the procedures set out in section 2.3, the competitor to replace the auxiliary, assigning a reasonable deadline for fulfilment, starting from receipt of the request. The competitor, within this deadline, must produce the documents of the replacing auxiliary (new declarations of availment by the competitor, the DGUE of the new auxiliary and the new contract of availment). If the time limit has expired in vain, or if no request for its extension has been made, the contracting authority shall exclude the competitor from the procedure. The failure to produce the declaration of use or the contract of use may be remedied by means of instruction aid, provided that the aforementioned elements are pre-existing and can be proven by documents of a certain date prior to the deadline for submitting the tender. Failure to indicate the requirements and resources made available by the auxiliary undertaking cannot be remedied as a cause for the nullity of the availing contract*».